FILE COPY

No. 556

In the Supreme Court of the United States

October Term, 1912.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CREEK, STATE OF OKLAHOMA, A MUNICIPAL CORPORATION, *ET AL., Petitioners,*

vs.

EVELYN SEBER, *ET AL., Respondents.*

Answer to Petition for Writ of Certiorari.

LEONARD O. LYTLE,
GEORGE H. JENNINGS (of Counsel),
Sapulpa, Oklahoma,
Counsel for Respondents.

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IN THE SUPREME COURT OF THE UNITED STATES.

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vs.

EVELYN SEBER, *ET AL.*, *Respondents.*

ANSWER BRIEF TO THE PETITION FOR WRIT OF *CERTIORARI*.

Statement.

We respectfully challenge the sufficiency of the petition, together with the supporting brief, to show cause for the issuance of the writ, and ask for its dismissal, or in the alternative, for a denial of the writ.

A correct understanding of the history of the case and the issues determined may be obtained from the findings of fact and conclusions of law of the trial court (Clk. Tr. 41-50, 50-52) and from its opinion, which, although not included in the record, is reported in 31 Fed. Supp., at page 731, *et seq.* A more concise history is contained in the decision of the Honorable Circuit Court of Appeals for the Tenth Circuit (Clk. Tr. 61, *et seq.*), which is reported as *Board of County Commissioners of Creek County* v. *Seber, et al.*, 130 F. (2d) 663.

We respectfully assert that a consideration of the decision of the Circuit Court of Appeals clearly demonstrates that it is in harmony with the former decisions of this Honorable Court, which are overlooked in the statement and argument of the petitioners herein.

We here attempt to avoid a discussion of the merits, except incidentally and only in so far as we deem it necessary to show that the writ should not issue.

The Basis of Petitioners' Claim.

The petitioners present their claim to the issuance of the writ under five separate specifications of error, which they set forth at pages 10 and 11 of their supporting brief; the last three of which are unsupported by argument, and are, we believe, without support in the record in this case.

We believe that our argument can be more clearly presented by first disposing of these latter assignments, rather than by a discussion of the specifications of error in the order assigned by them.

In their third specification of error, petitioners assert (their brief, page 11):

> "The Circuit Court of Appeals erred in holding that—because Wosey John Deere owned an interest in the lands in question on January 1, 1937—respondents were entitled to recover ad valorem taxes paid on said land for the year 1937, even though neither Wosey John Deere nor the administrator of her estate were parties to the action."

We assert that the decision of the Circuit Court of Appeals upon this point (Clk. Tr. 68-69) does not sustain the basis of this contention.

We call attention to the fact that the taxes for the year 1937 were paid by respondents (Agreed Statement of Facts,

Clk. Tr. 46), and, of course, since neither Wosey John Deere, nor the administrator of her estate were interested in the event of the action, they were not necessary or proper parties thereto. Rule 19, Rules of Civil Procedure.

In addition, no such question was presented by petitioners, either by answer (Clk. Tr. 33-40), or in their statements of points for consideration on appeal (Clk. Tr. 1-3). This question not having been presented or considered in the courts below should not be examined here. *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 56 S. Ct. Rep. 269, 80 L. ed. 284.

In their fourth specification of error, petitioners assert (their brief, page 11):

> "The Circuit Court of Appeals erred in permitting respondents to recover ad valorem taxes which had been paid on the land in question more than three years before the filing of this action, such action being barred by the statute of limitations of the State of Oklahoma."

This specification is without foundation in the record in this case. The recovery was specifically limited to the payments which were made by respondents within the three-year statutory period prescribed by the statutes of the State of Oklahoma.

This is shown by the decision of the Circuit Court of Appeals, wherein it is held (Clk. Tr. 72):

> "*The contention with reference to the statute of limitations need not be noticed* since we hold that all the lands involved here were not exempt from taxation for the taxable year beginning July 1, 1936, and ending June 30, 1937, hence the taxes levied, assessed, and paid for this period, together with penalties, were lawful and not recoverable. *All other taxes assessed and paid, and held to be illegal and void, are concededly within the statute of limitations.*" (Italics ours.)

The petitioners assert in their fifth specification of error (their brief, page 11):

> "The Circuit Court of Appeals erred in upholding Federal jurisdiction in this action, in view of Section 12,665, O. S. 1931, which has the effect of requiring that actions for the recovery of illegally collected taxes shall be filed in the courts of the State of Oklahoma rather than the Federal courts."

A reading of the cited statute, which is set forth in full in an appendix to this brief, at page 8, shows that it does not purport to deprive the Federal Courts of jurisdiction of a suit of this nature.

In any event, the jurisdiction of the Federal Courts cannot be limited or defeated by the statutes of a state. *Lincoln County* v. *Luning*, 133 U. S. 529, 10 S. Ct. Rep. 363, 33 L. ed. 766; *Chilcot County* v. *Sherwood*, 148 U. S. 529, 13 S. Ct. Rep. 695, 37 L. ed. 546.

We shall present our argument and authorities in answer to petitioners' remaining specifications of error, under the following counter-propositions in *seriatim*:

Counter Proposition Number One:

> The Acts of Congress here in question are constitutional; and the decision of the Circuit Court of Appeals in so holding is in harmony with the decisions of this court.

Counter Proposition Number Two:

> The tax-immunity created by these acts is applicable to the lands here involved, and the decision of the Circuit Court of Appeals in so holding is in accord with the decisions of this court.

ARGUMENT *and* AUTHORITIES.

COUNTER PROPOSITION NUMBER ONE.

The Acts of Congress here in question are constitutional and the decision of the Circuit Court of Appeals in so holding is in harmony with the decisions of this Court.

The petitioners, in their first specification of error (their brief, page 10), assert that Section 2 of the Act of Congress of June 20, 1936 (49 Stat. 1542, 25 U. S. C. A. 412); as amended by the Act of May 19, 1937 (50 Stat. 188, 25 U. S. C. A. 412a); is unconstitutional.

The basis of this contention, as stated by them, is that Congress "cannot for the purpose of exemption from state taxation, create a 'Federal instrumentality' out of the person or property of an individual merely because such individual is possessed of a quantum of Indian Blood."

This contention finds full answer in the language of the acts in question, which, we assert, clearly demonstrates that these instrumentalities were not created for the purpose of securing an exemption from state taxation, but rather the immunity from such taxation was provided by these acts to preserve instrumentalities theretofore created under congressional authority.

The power of Congress to impose restraint upon the alienation of lands of its Indian wards cannot be doubted, whether such lands are acquired by private purchase or not. This power rests upon the dependent character of the Indians, their recognized inability to safely conduct business affairs, and the peculiar duty of the Federal government to safeguard their interests and protect them against the greed of others and their own improvidence. *Sunderland v. United States*, 266 U. S. 226, 45 S. Ct. Rep. 64, 69 L. ed. 259.

Likewise, the rule that Congress, acting within the lim-

its of the Federal Constitution, has power to exempt its instrumentalities from state taxation is too well settled to leave room for doubt. *Pittman* v. *Home Owners Loan Corp.*, 308 U. S. 21, 60 S. Ct. Rep. 15, 84 L. ed. 11; *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 48 S. Ct. Rep. 333, 72 L. ed. 709; *United States* v. *Wright*, (C. C. A. 4) 53 F. (2d) 300, cert. den. 285 U. S. 539, 52 S. Ct. Rep. 312, 76 L. ed. 932. This rule is directly applicable to the statutory enactments here in question.

We respectfully assert that Congress had the Constitutional authority to enact the statutory provisions here in question; that they are binding upon the courts as the law of the land (*Pittman* v. *Home Owners Loan Corp., supra*), and the decision of the Circuit Court of Appeals in so holding is in accord with the decisions of this Honorable Court.

COUNTER PROPOSITION NUMBER TWO.

The tax-immunity created by these Acts is applicable to the lands here involved, and the decision of the Circuit Court of Appeals in so holding is in accord with the decisions of this Court.

The petitioners, under their second specification of error, assert that the acts in question "apply only to 'landless' Indians who had never held land prior to the purchase of property out of their restricted funds," and they say, that since respondents own other property which they inherited from their mother, the lands here involved do not fall within the immunity provided by these acts.

They do not attempt to show wherein the acts in question are susceptible of the claimed construction, but predicate this claim solely upon quoted excerpts from the statement made by the Honorable Elmer Thomas, Chairman of the Committee on Indian Affairs of the United States Senate, when the 1936 Act was under consideration.

We respectfully assert that the acts here in question do not lend themselves to this claimed construction, and that the statement relied upon by them does not sustain their claim. In any event, this statement cannot be considered for the purpose of construing the acts in question contrary to their plain terms. *Pennsylvania Railroad Co.* v. *International Coal Min. Co.*, 230 U. S. 184, 33 S. Ct. Rep. 893, 57 L. ed. 1446.

Their statement that "the 1936 Act made the exemption a personal right, limited to the person whose funds were used to purchase the lands," (their brief, page 23) finds full answer in the decision of the Circuit Court of Appeals upon this point (Clk. Tr. 68-69).

In addition, the Amendatory Act of 1937 should be considered as an aid to the construction of the 1936 Act, if there be any doubt as to the proper construction of the former statute. *Tiger* v. *Western Inv. Co.*, 221 U. S. 286, 31 S. Ct. Rep. 578, 55 L. ed. 738. Viewed in the light of this rule, there can be no doubt as to the construction of the 1936 Act.

Wherefore, Respondents most respectfully pray that the petition for writ of *certiorari* be dismissed, or in the alternative, denied.

Respectfully, submitted,

LEONARD O. LYTLE,
GEORGE H. JENNINGS,
(Of Counsel)
Sapulpa, Oklahoma,
Counsel for Respondents.

APPENDIX.

Section 12,665, Okla. Stat. 1931, is, in full, as follows:

"In all cases where the illegality of the tax
leged to arise by reason of some action from whi
laws provide no appeal, the aggrieved person sha
the full amount of the taxes at the time and in the
ner provided by law, and shall give notice to the
collecting the taxes showing the grounds of com
and that suit will be brought against the officer f
covery of them. It shall be the duty of such collecti
ficer to hold such taxes separate and apart fro
other taxes collected by him, for a period of thirty
and if within such time summons shall be served
such officer in a suit for recovery of such taxe
officer shall further hold such taxes until the final
mination of such suit. All such suits shall be brou
the court having jurisdiction thereof, and they
have precedence therein; if, upon final determi
of any such suit, the court shall determine tha
taxes were illegally collected, as not being due the
county or sub-division of the county, the court
render judgment showing the correct and legal a
of taxes due by such person, and shall issue such
in accordance with the court's findings, and if su
der shows that the taxes so paid are in excess
legal and correct amount due, the collecting officer
pay to such person the excess and shall take his r
therefor."